Docket No. 81-2332

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In the Supreme Court of the United States

October Term 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
Respondent,

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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THE PETITION FOR CERTIORARI MISTATES THE QUESTION PRESENTED

The Petition states (p. i) that the question is whether Respondent, a public service corporation,[1] is a "displaced person" under the URA and so entitled to

1. The Chesapeake & Potomac Telephone Company of Virginia is a wholly owned subsidiary of American Telephone and Telegraph Company.

relocation payments "for the cost of removing its distribution facilities from public rights of way in the execution of an urban renewal project. . . ." (Emphasis supplied.)

Respondent's lines were not moved from public rights of way. They were moved from land which NRHA had acquired for the project so as to own this land in fee simple absolute, free from the public right of way which had previously encumbered it, and so as to enable NRHA alone, and neither the City, the State nor any other governmental authority or private person, either to permit or to forbid any further use of the land by the public or for the delivery of any public service.

This case does not involve any exercise of the unquestioned authority of a State or city government to control the use of land devoted to public use as a

street or highway by requiring rearrangement or removal of utility lines in the street to improve its usefulness to the public. The city government here did not exercise any governmental power or any right reserved to it under the terms of C&P's franchise to require a relocation of C&P's telephone lines. It could not do so after NRHA's acquisition of outright ownership of the land for redevelopment had been completed by extinguishment of the public easement which had formerly entitled the public to use the land and the city to control the manner in which it should be used by the public or to deliver public services through utility lines.

NO DECISION OF THIS CASE CAN BE OF IMPORTANT CONSEQUENCE TO URBAN RENEWAL PROGRAMS GENERALLY OR TO ANY ONE PROJECT

The fact that HUD does not join in the Petition for Certiorari refutes

Petitioner's contention that the decision of the Court of Appeals will seriously affect urban renewal programs throughout the nation.

Petitioner's attempt to explain HUD's failure to join is transparent. C&P's action against HUD and NRHA is primarily a suit for declaratory judgment to determine the rights and duties of the parties in situations common to most urban renewal programs, in which all three parties are often involved. Such declaratory relief is first and foremost among the forms of relief sought by the Complaint, is obviously of more importance to each of the parties than the enforcement of C&P's claims in this one case, and must surely be a part of any final judgment entered consistently with the decision and opinion of the Court of Appeals. Although the expenditure of public funds required to pay C&P's

claims and similar claims in other cases, by either the Federal government or the municipality, is minuscule on the scale of governmental expenditures for urban redevelopment, it is certainly true that such a judgment will materially alter policies and practices which HUD now follows in administering all Federally supported urban renewal projects.

HUD and only HUD, among the parties to these proceedings, is in possession of the detailed and comprehensive information needed to arrive at an informed opinion as to the possible effect of this case on urban renewal programs everywhere. In the light of such knowledge HUD obviously does not concur in Petitioner's contention that this case is of such nationwide importance as to merit consideration by this Court.

Facts within common knowledge explain HUD's inability to support

Petitioner's position as to this. The cost of paying claims like those of C&P could not amount to more than an insignificant fraction of the total cost of a redevelopment project. In addition to such major items as the cost of purchasing or condemning all of the land and buildings within the entire urban area to be redeveloped, the cost of demolishing and removing from the land all of the existing buildings, and the cost of engineering studies and planning and design work necessary to redesign and prescribe the future development of a substantial portion of an old city, the total governmental expenditure always includes the cost of relocating all city water mains, city sewers and storm drains, city gas lines, municipally operated electric power and light systems, and all other municipally operated public utility systems as required by the redevelopment

plan. To the inevitably great sum of these expenses the payment of claims like those of C&P would add only the cost of moving any similar facilities which are owned and operated by public service corporations rather than by the municipality, and then only to the extent that such facilities are moved as a result of the acquisition of land for the project and not as a result of improvements to an existing street.

Nor is this case important for any departure from an established or generally accepted prior interpretation of the URA. Petitioner's assertion that a different interpretation has been placed on the URA by other Federal agencies, or by any governmental agency other than HUD and redevelopment authorities following its dictation, and that this interpretation has been accepted by other utility companies, is wholly

unsupported by anything shown in the proceedings below and if there alleged would have been disproved. Also it is refuted by the protracted deliberations by both NRHA and HUD which preceded any decision of this question by either of them in this case. Any such firmly established and universally accepted interpretation of the URA would have been instantly decisive of all of C&P's claims, but as the record below will clearly disclose the NRHA, which has never questioned C&P's claims on any other ground, made no decision on any of these claims for one year and three months after the first of them had been presented, and on the administrative appeal to HUD this single question was kept under consideration and undecided by HUD's Regional office for more than eight months.

Petitioner argues that the cost of paying such claims might be burdensome to financially troubled city governments. Whatever small fraction of the total cost of a redevelopment project might be represented by the payment of such claims the city's one-third share of it could not seriously affect its ability to undertake a redevelopment project.

Petitioner argues further that many cities may have embarked on projects for which the payment of such claims has not been budgeted. It is not reasonable to suppose that either local governments or HUD have based their financial planning to any important extent on an immovable conviction that the effect of the URA could not possibly be what a unanimous panel of the Court of Appeals has held it to be. Nor can Petitioner complain if Federal assistance in the payment of C&P's claims has been lost or made

doubtful by the fact that the projects involved "have proceeded to financial settlement." (Petition p. ii). This could hardly have occurred before the claims had been duly presented. Also it is hardly possible that any such settlement based on a mistaken view of the law by both HUD and NRHA is incapable of being corrected.

THE COURT OF APPEALS HAS NOT "CHANGED THE COMMON LAW," OR HELD THAT THE URA CHANGED THE COMMON LAW, OTHERWISE THAN AS EXPRESSLY PROVIDED IN THE ACT OF CONGRESS AND IN ACCORD WITH ITS MANIFEST PURPOSE

The decision of the Court of Appeals is based on statutory language providing in so many words that relocation payments shall be made to any person, specifically including any corporation, which, as the result of an acquisition of land by a government agency for a government project, moves or moves its personal property

from the land so acquired, or from any land on which such person conducts a lawful business activity if the move is made as the result of a governmental acquisition of other land for a government project. 42 U.S.C. §§ 4601, Subsections (5) through (7) and 4622. Under a statute which thus explicitly requires payment of relocation benefits to any owner of any personal property who has to move it because a government agency has acquired the land on which the owner of the personal property has previously been permitted to install and maintain it, the Court of Appeals refused to rewrite these totally unambiguous provisions of the Act and refused to give to the URA only the effect which it would have if § 4601(5) had said that the term "person" means any individual, partnership, corporation or association other than a public service corporation, or if

§ 4601(6) had said that the term "displaced person" means any person who moves his personal property from real property, as a result of the acquisition of such real property for a program or project undertaken by a Federal agency or with Federal financial assistance, unless such personal property is equipment of a public service corporation which has been permitted to install and maintain such equipment on such real estate when it was devoted to public use as a street. In refusing to read into the Act exceptions which it nowhere contains the Court of Appeals can hardly be said to have "departed from the accepted and usual course of judicial proceedings."

Petitioner's contention that the Congressional purpose was to accomplish something less than the statutory language requires is not supported by anything in the Act or in its legislative

history. Petitioner argues that if Congress had intended application of the URA to relocations of utility lines which have been built in public streets it would have specifically referred to displacements of such facilities, pointing to the fact that it did so in the District of Columbia Public Utilities Reimbursement Act of 1972. Had it not done so that Act would have been unintelligible. The DCPURA, like § 123 of the Federal-Aid Highway Act, 23 U.S.C. § 123, which this District of Columbia Act directly parallels so as to make like provision for interstate highway projects in the District of Columbia, is directed to the special burden which falls on utility companies and their customers when massive government financing makes possible large-scale renovation and rebuilding of public streets and highways

necessitating extensive rearrangements of utility lines in existing streets and highways, independently of any government land acquisition and whether or not the relocation is in any way related to any acquisition of land for the project. One of the two operative sections of this 1972 Act, § 4, authorizes reimbursement for every utility line relocation made necessary by "the construction or modification of a project on or a part of the National System of Interstate and Defense Highways". (P.L. 92-495 § 4.) The other, § 3, authorizes such payments "whenever, as the result of urban redevelopment any utility facilities are required to be relocated * * * in order to meet the requirements of or to conform to a redevelopment plan * * *". (Id., § 3). Every redevelopment plan includes, or assuredly may include, the upgrading and rebuilding of existing streets in such a manner as

to require relocation of utility lines as a result of the street improvement and not as a result of any acquisition of land for the project. The DCPURA necessarily dealt explicitly with such relocations, and affords no indication that the URA did not also authorize reimbursement for moving utility lines which had originally been built in public streets if the relocation resulted from acquisition of the land for a government project and not from a street improvement program.

The decision of the Court of Appeals by no means "reverses" the familiar common law rule established by the landmark case of New Orleans Gaslight Company v. Drainage Commission, 197 U.S. 453 (1905) and everywhere followed in cases like Potomac Electric Power Company v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971), cited by Petitioner. This rule upholds the governmental power of State

and local governments to control the use of land in public streets, parks and other public places by requiring relocation or removal of utility lines occupying such land, when the public interest so requires, without compensation to the owners of such lines. These and the many other decided cases confirming the existence of this broad governmental authority under the police power all involve relocations of utility lines occupying land which will continue to be devoted to use by the general public at and after the time of the relocation. Even if this governmental power is not strictly dependent upon continued existence of the public easement encumbering the land from which utility lines are displaced the decision of the Court of Appeals in no way denies the continued existence of this power and indeed can hardly be said to

change existing law as to the exercise of this power.

THE DECISION OF THE COURT OF APPEALS IMPOSES NO INEQUITABLE BURDEN AND AFFORDS NO "WINDFALL" OR OTHER INEQUITABLE BENEFIT

Before the URA when a utility company had to relocate its lines because the land had been acquired for redevelopment this part of the cost of redeveloping part of an old city had to be borne by the people who use the utility service and pay all costs incurred in providing it, notwithstanding the fact that most of them are not part of the community benefited by the redevelopment. This occurred only because of a highly dubious administrative policy of HUD and its predecessors, which fully recognized the expense of moving utility lines as part of the cost of the project, to be borne by Federal and city taxpayers, wherever

the utility system was municipally owned, but denied such recognition if the same facilities were owned and operated by a public service corporation. The URA as applied by the Court of Appeals relieves against this inequitable consequence to those who pay their utility bills to a utility company rather than to a municipal agency. As in the case of all other displaced persons subjected to moving expenses as a result of a governmental acquisition of land for a government project, the URA here accomplishes its stated purpose, which is declared to be

> * * * to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. 42 U.S.C. § 4621.

Nor could there possibly be any "windfall" to C&P or any "double recovery"

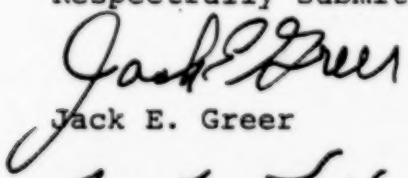
as the Petition asserts without the slightest actual or possible support. Under standard principles of accounting C&P's pending claims against NRHA are necessarily reported as accounts receivable and nowhere reported as expenses so as to be reflected in its rate base or in any charges which have been made to or paid by its customers.

CONCLUSION

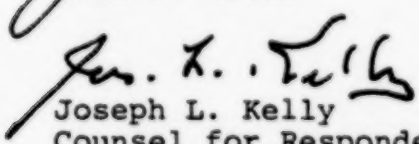
The decision of the Court of Appeals firmly settles the single question of Federal law presented, excluding any future doubt about the effect of statutory language which leaves no room for speculation as to legislative intent. Neither the Petitioner nor the District Court which dismissed C&P's action and the two State courts which have accepted Petitioner's view of the statute has even attempted to show how any decision other

than the one reached by the Court of Appeals could possibly be reconciled with the clear and unequivocal language of Subsections (5) through (7) of 42 U.S.C. § 4601. Any governmental agency objecting to the broad scope of these provisions should address its objections to the Congress and not to the Supreme Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 1982, three copies of the foregoing Brief in Opposition to Petition for Certiorari were mailed, postage prepaid to each of the following:

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